IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

NORTHERN DIVISION

WILLIAM GRANT KOLKOW AND LINDA R. KOLKOW,

PLAINTIFFS,

v.

BANK OF AMERICA, N.A.; BAC HOME LOANS SERVICING,LP; RECONTRUST COMPANY,NA; FEDERAL NATIONAL MORTGAGE ASSOCIATION; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS INC.; AND DOES 1 THROUGH 10,

DEFENDANTS.

CASE NO. 1:11-CV-118

SALT LAKE CITY, UTAH
DECEMBER 20, 2012

DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT
BEFORE THE HONORABLE ROBERT J. SHELBY
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

FOR THE PLAINTIFFS:

MORSE & MORSE
BY: DANIEL J. MORSE, ESQ.
6078 SHADYCREEK DRIVE
AGOURA HILLS, CALIFORNIA 91301
(865) 524-2569

FOR THE DEFENDANTS:

ACKERMAN SENTERFITT LLP
BY: CHANDLER P. THOMPSON, ESQ.
170 SOUTH MAIN STREET, SUITE 950
SALT LAKE CITY, UTAH 84101
(801) 907-6900

COURT REPORTER:

RAYMOND P. FENLON
351 SOUTH WEST TEMPLE, #7.430
SALT LAKE CITY, UTAH 84101
(801) 809-4634

P-R-O-C-E-E-D-I-N-G-S

(3:36 PM)

THE COURT: Good afternoon. We will go on the record in case number 1:11-CV-118. Counsel, why don't you go ahead and state your appearances, if you would, please.

MR. THOMPSON: Chandler Thompson for the Defendants.

THE COURT: Good afternoon.

MR. MORSE: And I'm Daniel Morse for the Kolkows.

THE COURT: Good afternoon, welcome, both of you. Thank you. This is the time set for hearing on the Defendants' motion to dismiss.

I think, Mr. Morse, I have a question for you first out of the gates. The Defendants submitted some supplemental authority, the RM Lifestyles decision from the Utah Court of Appeals relating to the quiet title claim. We didn't receive a response from the Plaintiffs, of course you are not required to submit one. I guess I'm wondering whether in your view that case is dispositive of the quiet title claim.

MR. MORSE: No, certainly not. I think Babcock is controlling.

THE COURT: Okay. So it's the Defendants' motion. Mr. Thompson, I'll go ahead and invite you to take the first run at it.

MR. THOMPSON: Thank you, Your Honor. This

litigation relates to a mortgage loan that was originated in 2004. According to the facts as alleged in the complaint, the Plaintiffs experienced hardship in 2008 when they were not living in the property, and our records confirm that the first default did occur in that year.

As of July of 2009, the loan was still in default but the parties entered into a forbearance agreement dated July 19th, 2009, which is attached as Exhibit 3 to our motion. The forbearance agreement provides that in exchange for six months of reduced payments, BAC Home Loan Servicing would suspend foreclosure activities. And there is no allegation in this case that any Defendant breached any of the terms of that agreement.

The agreement specifically provides that at the termination of the agreement, any foreclosure proceedings that have been suspended may resume. And also I should apologize for my voice. I've been a little under the weather. My voice usually sounds annoying to me on tape but today it sounds annoying just as I stand here.

The COURT: No problem. Thank you.

MR. THOMPSON: The forbearance agreement further provides that it's not a loan modification, and upon termination the servicer can modify the loan, require Plaintiffs to reinstate the loan, or foreclose.

Plaintiff alleges that at the conclusion of the

forbearance period they were told that they prequalified for a HAMP modification, but they could only qualify if they -- the property was their principal residence. They allege then that they moved from Arizona to Utah in July of 2010. Interestingly, in the forbearance agreement they represent that it is their principal residence. And that was in July of 2009.

Plaintiffs allege that after moving back to Utah 2010, July, BAC promised to send them a HAMP modification application package and that they got that application package in September. They then allege that they returned all the documents, they submitted all the requested information, and that the modification was denied in April of 2011 based on the net present value test.

As far as the foreclosure activity, ReconTrust was substituted as the trustee under the deed of trust in October 2010. They recorded a notice of default at that time, and the property was sold at a foreclosure sale on May 3rd, 2011, and the Plaintiffs still are in possession of the property.

They assert six causes of action: Breach of contract, which according to the complaint includes breach of the loan contract and breach of the Servicer Participation Agreement related to BAC's or Bank of America's participation in the HAMP program, to which they claim to be an intended third-party beneficiary.

The second claim is for negligence by allegedly failing to properly process their modification application.

Third is quiet title based on ReconTrust's alleged lack of authority to exercise the power of sale.

Fourth is emotional distress based on the denial of the loan modification following their move from Arizona back to Utah.

The fifth is promissory estoppel based on the alleged statement that they prequalified for a HAMP modification.

The final cause of action is declaratory judgment that ReconTrust lacked authority to exercise the power of sale, that the sale is void, and that the trustee's deed in favor of Fannie Mae is also void.

I'd like to address the easier claims first and put the ReconTrust claim, which includes declaratory judgment and quiet title, to the back. That's the more complicated claim that also involves an appeal to the Tenth Circuit and a split in authority on -- amongst the federal -- Utah federal judiciary.

So going back to breach of contract, as we indicate in our motion to dismiss, Plaintiff cannot state a claim for breach of contract. First of all, the law is very clear that you cannot state -- there is no private right of action under HAMP, and that borrowers are not intended third-party beneficiaries under servicer participation agreements. There

just is no authority whatsoever to support that claim.

Second, there's no contractual right in any of the loan documents to any kind of a modification or modification process, and thus Defendants' alleged mishandling of the modification process or handling it not to Plaintiffs' liking, cannot state a claim for breach of contract.

And, third, even if there were contractual rights to some kind of modification process, Plaintiffs' breach of the loan agreement two years before the modification process got going would doom that claim.

THE COURT: Well, the parties could agree orally to modify their arrangement.

MR. THOMPSON: Well, that would be -- that would create an issue under the statute of frauds because it's either a credit agreement or an agreement relating to property, and any -- the modification of any agreement that's subject to the statute of frauds is also subject to the statute of frauds.

THE COURT: Well, except that there are exceptions for that, right? I mean some of those are noted by Judge Stewart I think in one of his decisions in the last year or two dealing with an issue like this.

MR. THOMPSON: Well, there are some exceptions, but like, for example, promissory estoppel, if there is no -- if there's no reasonable explanation for the actions that

occurred other than there being a promise. There are very strict standards for getting around the statute of frauds. If we're talking about a modification to a written contract subject to the statute of frauds and the Court would like more briefing on that issue, I'd be happy to do it. I addressed those issues in several cases, but the bottom line is it is a very stringent standard to get around the statute of frauds.

THE COURT: All right. I agree with that.

MR. THOMPSON: They also make a claim within their contract claim for breach of the covenant of good faith and fair dealing, but establishing such a claim would require the contract to be written, create rights that aren't contained in the contract, and where there is no breach of a contractual provision, there cannot be a claim for the covenant of good faith and fair dealing.

Now, addressing Plaintiffs' arguments about breach of contract in the opposition --

THE COURT: So if we find that the parties orally modified their agreement, then does that give rise to a duty on behalf of the banks to conduct themselves in accordance with good faith and fair dealing?

MR. THOMPSON: I would say yes, that if there is a valid modification, even if the -- the deed of trust says it has to be and the note modified in writing only.

Addressing Plaintiffs' arguments, the Stanton case, which

goes to the good faith and fair dealing, is a Judge Kimball case, is clearly distinguishable. That case involved a promise to forbear from foreclosure while the modification was in process, which was breached. And the way that it was breached prevented the Plaintiffs from taking steps to protect their interests, and that upset the expectations of the parties.

THE COURT: Isn't that also possibly the case here? I mean the Plaintiffs don't talk about this in the complaint or in the briefing, but, for example, if we get into the requirement that the -- that the Plaintiffs object to the sale in advance of the trustee sale for example --

MR. THOMPSON: Or show prejudice.

THE COURT: Sure. The bank foreclosed 13 days earlier than they told the Plaintiffs they would, right? Does that impact their ability to raise those objections in a timely manner?

MR. THOMPSON: Well, I'm not sure exactly how they were told that it was 13 days later than it actually was.

The Court: Well, in the letters, in the correspondence that you submitted, but it came with the briefing.

MR. THOMPSON: Right. But there isn't -- I mean there's no claim in this case that if we had those 13 days X would have happened.

THE COURT: I agree.

MR. THOMPSON: And in this case, going to the Stanton case, the parties clearly complied with the forbearance. There was no foreclosure during the modification process. It was not until the modification was denied that the foreclosure actually happened. And the rights related to the forbearance were clearly -- they clearly obtained every benefit of those rights.

They also attempt to alter their claim somewhat in their opposition on the -- on the breach of contract claims in two ways. They argue that the deed of trust is governed by Utah law and that -- and that therefore ReconTrust breached that agreement by exercising the power of sale in contravention of Utah law.

I'll discuss the role -- ReconTrust's role later, but, first, the response to both of the new arguments on the breach of contract claim, the second one being that there was an oral modification, the prequalification statement is an oral modification. First, the memorandum in opposition to a motion to dismiss is not the proper avenue to make that kind of claim.

With respect to the contract being governed by Utah and federal law, which the Plaintiff says, that's a matter of -- that's not -- that doesn't create substantive rights. That's a matter of how the Court will interpret the contract. And

the deed of trust does not state, as it could have, and as it did in the 1880 case that they cite on the ReconTrust issue, that only a specific trustee can exercise the power of sale.

On the attempt -- on the modification to the written contract, I mean that claim is not in the complaint and so it's difficult for me to address. It would require, I would think, significant -- what was the agreement?

THE COURT: I agree. I think -- well, it may be more helpful to hear more from you in rebuttal after we hear from the Plaintiffs on the breach of contract claim, but I understand the arguments that you're making, I understand the briefing, and I've read the cases that relate on that issue.

MR. THOMPSON: Okay. The bottom line is there isn't a writing that would support any kind of modification to that contract.

The negligence claim fails because it is well established in Utah and across the country that lenders and loan servicers in arm's length transactions with borrowers do not owe in negligence a tort duty of care. The relationship is governed by contract, it's arm's length, and it's adverse.

THE COURT: Actually, I don't mean to cut you off -- well, actually I do mean to cut you off. I'm going to invite you to skip past the negligence too I think until we hear from the Plaintiffs. I think they may have some work to do on that claim.

MR. THOMPSON: Okay.

THE COURT: Why don't I focus you on, if I can, on the emotional distress claims and the promissory estoppel claim.

MR. THOMPSON: Okay. Emotional distress, that claim fails for several reasons, the first reason being foreclosure on a deed of trust after admitted default on a note, especially three years -- after three years of trying to work out an arrangement, is not an outrageous act.

THE COURT: Well, that's too narrow though, isn't it? I mean don't we have to evaluate the Plaintiffs' well pled allegations, including all of the facts and circumstances that they allege are part of this transaction, making repeated representations to the Plaintiffs that they're prequalified, you're prequalified, you just need to move back here, leave your job, get rid of your renters, continue -- I mean this is all part of what needs to be considered, is it not?

MR. THOMPSON: No. I agree. But you're prequalified, there was never any -- never alleged any representations here is the modification that you're going to get and here are the terms. It was you're prequalified to apply for a HAMP modification. There was never any promise you get a loan modification.

THE COURT: But they don't -- that's not an element of an emotional distress claim, is it?

MR. THOMPSON: No, it isn't, but you're talking about evaluating all of the circumstances trying to determine if there is a sufficiently outrageous act, and merely saying -- I mean the truth is in order to get -- in order to qualify for HAMP it does -- you do -- it does have to be your principal residence, and those are the rules. And just about every modification process includes a this is your principal residence representation.

So there just -- there's nothing here that says if you move -- you've prequalified. If you move back, we'll give you an application. You can submit it. And there's never a representation you're getting a loan modification. It was their decision to move back several years after they defaulted.

THE COURT: So what does it mean you're prequalified? What does that mean?

MR. THOMPSON: Well, I'm not sure -- you know, I'm not exactly sure what that means. I'm not exactly sure that's what was said. That's what the allegations are. But what I understand that it means is you fit the criteria in that your loan is for a certain amount. You are a certain number of months in default, and all the other -- the basic qualifications before you do the net present value test, before you do the -- you analyze their income, and before you analyze their hardship to determine to -- to apply within

the -- within the parameters for obtaining that kind of a modification.

THE COURT: Okay. But that's not what the Plaintiffs state in their complaint, right? And at this stage on a motion to dismiss, don't I resolve those factual -- am I not required to resolve those factual questions in the Plaintiffs' favor?

MR. THOMPSON: Well, but there isn't any representation. There isn't any factual allegation other than prequalified.

THE COURT: Right.

MR. THOMPSON: So I mean, yes, I think what I've just explained to you is beyond the complaint, and I'm just trying to explain my understanding, but that doesn't mean that there are -- you know, we can add these kinds of allegations, prequalification meant blank because they don't allege it.

THE COURT: Could a jury find and conclude that it's sufficiently outrageous conduct for a bank in possession of all the relevant information, allegedly, to tell a homeowner that they prequalify for a modification, everything will be fine, just move back, leave your other residence in Arizona, leave your job, kick out your renter who is paying the rent, and do all of this, and then just wait a while after you've already committed and then we'll tell you that we didn't really mean it? Suppose a jury -- can a jury conclude under

those facts and circumstances that this is outrageous conduct from a mortgage lender?

MR. THOMPSON: I don't think so. I don't think so, not based on the facts that are in this complaint, because there was never any promise here is your modification, here is your terms, you are entitled to this. And there's no contract right to be entitled to that. And if merely saying that someone told me that I prequalified for a modification sufficient to get to emotional distress and all of the other potential torts and things along those lines, when the written documents say the exact opposite, there is no right to a modification in any of these written documents, then I think you're opening up a gigantic can of worms in terms of it is going to affect the availability of credit in the mortgage market across the board, or affect the way in which the loan modification process works.

I mean if that's all it takes to get to emotional distress, and the Lord knows how much in damages or punitive damages is, well, they told me I prequalified, then, you know, I would advise my client don't consider anyone for a loan modification. You can't do it because -- send them a letter that says I'm sorry because all they have to say is on the phone some person in the bank said, sure, you prequalify. And that's a dangerous way to go.

The other problem with the emotional distress claim is

there isn't any allegations in there about emotional distress. It's just boilerplate emotional -- you know, I suffered emotional distress. I mean that's basically what the complaint says.

And I mean this is not a claim that is -- this is a stringent claim under Utah law, and it's not a claim you can just say I suffered emotional distress and get to a jury.

Promissory estoppel. A claim that we're estopped from foreclosing based on this prequalification statement, that the Defendants are estopped from foreclosure, but they cannot -- there's a number of problems with this claim. First, they cannot show that they detrimentally relied on that statement. They defaulted in 2008. That triggers the right to foreclose. They -- the statements about prequalification were not allegedly made until 2010. So there's no detriment related to the foreclosure process that they -- that they could have relied -- that they could have resulted because they relied on a prequalification statement.

THE COURT: I read that argument in your briefing. And let me say that I appreciated your briefing. I thought it was very helpful. But on this point I really was lost. I mean I don't -- maybe I just view the Plaintiffs' claim differently than you do, but I understand it to be a little more simple than I think the Defendants make it out to be in their brief.

The essence of the claim as I understand it is the bank made a promise to us. They offered an inducement, and knowing and intending that we would rely on it. And the promise in the inducement was you're prequalified, move back to your house, and we did. And as a result of that -- and the bank had all the facts and circumstances in their -- they knew the facts and circumstances. We relied and we were harmed. We left a job. I don't know what other cash or what other damages they might quantify. I'm actually a little concerned about that because it's not clear to me what those consequential damages would be. But just a simple we relied on your representation to our detriment and came back and we have some damages. I don't interpret their claim to go so far as to say, though Mr. Morse will correct me if I'm wrong, that it unwinds the entire mortgage.

MR. THOMPSON: Oh, no, I don't think he's making that claim either.

THE COURT: So why does the default in 2007 relate in any way to the -- I looked it up just to make sure I was focused on the right term. I looked again at the case law and the definition of promissory estoppel. I think it can hang on its own merits, can it not?

MR. THOMPSON: I mean you have to have detrimental reliance.

THE COURT: On what?

MR. THOMPSON: Well, in this case it's on the statement that you prequalified. I mean I think there are other problems with the claim that I'll get to in a minute, but -- and like, for example, I wasn't going to default, and you told me to default in order to obtain this modification. That's an equally dangerous kind of argument, but it's not here because they default two years before that statement.

And once that happens, there's no promise from that point forward we're not going to consider you that you're in default and utilize our rights that are -- that we're entitled to upon default. So there's no detriment from that statement that relates to the foreclosure process.

I see your point that you're saying, well, what about the move? And that is a slightly different issue. And I think that goes more to some of the -- some of the other elements of promissory estoppel, like the promise of -- the courts are very clear that there's a big risk that people can just say this kind of thing, and based on sympathies of the jury and all those sorts of things you can get around a written contract based on that kind of statement. So it has to be -- and for that reason the courts impose a fairly stringent definiteness test to the promise that is subject to promissory estoppel, and it has to be -- your reliance has to be objectively reasonable.

And in this case the written contracts clearly say they

have to be modified in writing, and that every one of the writings says we're preserving, we're not waiving any rights. And the promise is not definite. It's a -- there was always an application process involved. There's no terms of any kind of deal. I mean so if we offered a modification at that point with higher payments, I mean, you know --

THE COURT: Doesn't it depend -- on this claim doesn't it depend on what you're prequalified means, that phrase, you're prequalified?

MR. THOMPSON: I suppose it might but it doesn't -- just the allegation you're prequalified just doesn't give you any of the definiteness that is necessary for this kind of claim. I mean that's all we've got here is you prequalified. There isn't any other facts in the complaint about what they told -- you know, what they thought that meant, what the bank said that it meant, and there was always a modification process contemplated.

THE COURT: So how am I wrong if I view it this way on a motion to dismiss, that taking the factual allegations in the complaint as true, as I'm required to do, that there is a plausible claim, that the elements of promissory estoppel may be satisfied with respect to some damages but maybe not to others, that there might be a promise, an inducement, reliance, you're prequalified, we move back, there may be damages as a result, but that those damages might not reach

all the way to refinancing or the mortgage, no assurance that there would not be a foreclosure and the like? Isn't it a question of what -- what damages might be recoverable under the facts as pled?

MR. THOMPSON: I don't think so because I just -- I cannot -- the case law talks about having a definite and enforceable promise. The terms are there. The Court can say this was the promise. Prequalified for a HAMP modification application is not -- that does not meet that standard.

And, you know, you can look at the forbearance agreement which explicitly says that modification is one of the options but certainly not the only option. The loan -- the servicer also reserved the right to either require them to reinstate, to foreclose or to modify.

So we should move on then maybe to the ReconTrust issues, which are my favorite. And I think this might be one of the last of the ReconTrust cases that is currently out there. The issue is in front of the Tenth Circuit in Garrett. Oral argument is scheduled for January 14. The Utah bench is fairly evenly split with Judge Sam and Judge Stewart on saying that ReconTrust is authorized to exercise the power of sale, notwithstanding the Utah prohibition, because the National Banking Act indicates that where they perform three specific functions is where they're acting in a fiduciary capacity, and where they're acting in a fiduciary capacity is where -- is

which state's laws apply.

THE COURT: Right.

MR. THOMPSON: Now, I didn't brief it completely in my briefs because Judge Waddoups is one of the judges who has already decided that issue and went with Judge Jenkins and Judge Benson on saying that, no, the Utah law does apply.

THE COURT: Given the proximity of the hearing, the oral argument on appeal, is there any reason that we wouldn't give ourselves some time to be informed by whatever instruction it is the Tenth Circuit gives us?

MR. THOMPSON: There is one reason, which I will get into a second, but if the court -- but I do see the Court's point, and there is one issue in particular that I think we might get some guidance from the Tenth Circuit's ruling, and I hope that they rule quickly, and that is does it result in the sale being void?

As we argue in our briefs, I don't think the Court needs to reach the ReconTrust issue, and that's for several reasons. The remedy for the unauthorized exercise of power of sale is 57 -- UCA 57-1-23.5. And it provides that the remedy is actual damages, statutory damages of $2,000, and attorney's fees. It does not provide, as it well could have, any such sale is void.

So then you look at the common law, and the common law says we're not going to set aside a foreclosure sale unless

there is prejudice sufficient to enable the court to determine that the borrowers were unable to protect their interests. And the reason that I don't think the Court needs to decide it is all we have -- this statute, 57-1-23.5, the remedy, was not applicable at the time of the foreclosure sale. It went into effect several weeks later.

So they don't have that right to -- and it's not retroactive. So they don't have that right to statutory damages, actual damages or attorney's fees. However, the -- and a statute, a prohibition -- the prohibitory statute, 57-1-21, which says that you have to be a lawyer or a title company to exercise the power of sale, does not have a remedy, and it standing alone does not create a cause of action. There's a lot of law in Utah that says a statutory violation standing alone, unless there's legislative intent otherwise, does not create a cause of action.

The legislature in this case did indicate its intent when it enacted 23.5, but it did not make it retroactive and it also did not indicate that any such sale would be void. And the likely reason for that is the chaos in the property records that such a ruling would entail -- I mean such a -- not ruling -- such a statute would entail.

So without an allegation that ReconTrust's role in this process caused prejudice to the Plaintiffs, which there is no such allegation here, there is no private right of action

merely because ReconTrust violated 57-1-21, if they did.

We cite several cases in our brief that say when the legislature has specifically stated what the remedy is for a particular violation, then courts are not to add additional remedies, such as rendering a claim -- I mean the sale void.

So then you look again to the common law, which I mentioned. You have to show prejudice and inability to protect your interests, and that issue was again affirmed in the case that's cited in our supplemental briefs.

THE COURT: But the Tenth Circuit's determination in Garrett would impact at least the declaratory judgment claims. Do you agree?

MR. THOMPSON: Well, if the Court determines that there is not -- there is no prejudice, there's no private right of action by the statute alone, not considering the 23.5 which doesn't apply, then the only issue that the Garrett decision I think could impact is whether the mere violation of that 57-1-21, the statutory prohibition, renders the claim void, because there is no authority, except for this 1880 case cited by the Plaintiffs, to establish any kind of a remedy for the unauthorized exercise of the power of sale.

THE COURT: So is your --

MR. THOMPSON: And I think if you had prejudice as a result of ReconTrust, then you might have a different story.

THE COURT: So is your argument akin to that the

Plaintiffs lack standing to assert the declaratory judgment claims because even if we get partway down the road, we can't get all the way there?

MR. THOMPSON: Well, it's a -- it's a mootness issue. Yes. I'd say yes it's standing. There is case law that says you're not entitled to just a declaratory judgment that you were -- you were wronged. You're not entitled -- you know, it has to have some kind of practical effect. And if all we're talking about is whether ReconTrust had the power of sale but there is no remedy associated with that, then you cannot go for declaratory judgment.

THE COURT: So assume for a moment -- I'm not ruling. But if one or more of the Plaintiffs' claims survive the motion to dismiss, is there any harm or prejudice to the Defendants if the Court denies without prejudice the motion with respect to the declaratory judgment claims and the quiet title claims and gives the Defendants leave to refile after the Garrett decision?

MR. THOMPSON: Other than that this case has taken -- I mean, you know, we had a long stay and we were trying to do some workout options and that didn't work out. And so then there were several months in getting to a hearing. Other than the fact that now, you know, the borrowers have had the property for a long period of time, that's the prejudice. But I certainly would defer to the Court if it wanted some --

I -- the reason I didn't brief this really is I don't want to ask the Court to go out on a limb on an issue that is going to be decided with binding authority fairly soon.

So I would not have an objection if you -- if the Court felt that there was some issue that's alive in this complaint that Garrett might address, which we argue there isn't, then I think it would be a wise course to let the Tenth Circuit decide that. Of course I've had Tenth Circuit decisions take 18 months from the time of -- but I don't think it will take that long in this case.

THE COURT: All right.

MR. THOMPSON: Finally quiet title. It also relates to whether or not the foreclosure sale, the trustee's deed is void. You know, I've argued about why I don't think there's a -- rendering such, the sale and the deed, void is authorized by either the common law or the statutes, but it's also just not a proper remedy. If you -- even if you declared the trustee's deed void, it's not -- you shouldn't be -- we shouldn't be quieting title in borrowers who have admittedly defaulted on their loan three or four years ago now. And also because of that default, there's a cloud on their own title and quiet title is not the appropriate remedy, even if the trustee's deed were to be rescinded.

So unless you have any questions, I'll --

THE COURT: I don't. Thank you. You'll have an

opportunity to address anything that Mr. Morse raises.

MR. THOMPSON: Thank you.

MR. MORSE: Good afternoon, Your Honor. My name is Dan Morse. I'm here for the Kolkows. And I was just going to go in order.

THE COURT: I think that would be great. Why don't we start with the breach of contract claim if we can. My first question for you is what is the contract that is the subject of the breach?

MR. MORSE: Well, I think in reading the complaint again after I've -- after months have passed since I wrote it, there are several contracts alleged in the complaint and spelled out by the facts as alleged.

THE COURT: There are many that are identified, I agree.

MR. MORSE: And there are many contracts that are identified. And I'd like to point the Court to the -- the case is actually cited in the Defendants' brief, but that I had the pleasure of being counsel on before Judge Stewart. It was the Gayleen Coates case versus Wells Fargo. And I think that might have been what you were referring to earlier on.

But in it Judge Stewart, in denying Wells Fargo's motion to dismiss my client's breach of contract claim, stated as follows: To state a breach of -- to state a breach of claim for contract you must show a contract performance, breach of

the contract and damages. And then we had argued that the defendants had agreed to temporarily modify her loan by accepting lesser payments which would be credited to her account, and that she did submit these partial payments.

Now, that's sort of -- that's analogous, you'll notice in my pleading here, and that must be construed in my clients' favor where they were told they're prequalified and to send in a payment of fourteen-sixty-five-twenty-six, which they did, and then they -- the package never arrives and, you know, they never got their modification there. The next month arrives and they're told again, okay, okay, we'll get you a modification packet. Give us $1,500. They do it. Never -- it never shows up.

So there alone is the type of contract that was -- and I believe the facts show a breach as well, as discussed in the Coates case. And that did end up triggering an exception to the statute of frauds as recognized by Judge Stewart. And the supporting case law was Fisher v. Fisher out of the Utah Court of Appeals. So that's just one of the contracts --

THE COURT: Well, but we've got to do better than that.

MR. MORSE: I know. We've got other ones, don't worry.

THE COURT: No. Hold on a moment. For breach of contract we need to identify a contract.

MR. MORSE: Correct.

The COURT: We need to identify a specific term of the contract.

MR. MORSE: Right.

THE COURT: And allege a breach and then damages and the like, right?

MR. MORSE: Uh-huh.

The Court: And I think -- I'm looking at the amended complaint. Paragraphs 88 through 94 I think are the most relevant. In fact they're the only paragraphs that really purport to identify agreements and a bases for breach. But there's not even an allegation on the face of this claim, is there, of any specific term of any of these agreements that the Plaintiffs contend the defendants breached? Am I wrong?

MR. MORSE: Other than that there was an agreement to give them the modification, which they never did.

THE COURT: Well, where does it say that in your first cause of action?

MR. MORSE: That's incorporated by reference, 87, and that's why there's copious facts prior to 87.

THE COURT: Okay. So is the breach of contract claim asserted vis-a-vis an oral agreement between the Plaintiffs and the bank?

MR. MORSE: That is one. That is one of the contracts.

THE COURT: Okay.

MR. MORSE: There is another.

THE COURT: All right.

MR. MORSE: The deed of trust -- the deed of trust itself under -- by which secured the promissory note, in it said any -- if there is a default, any foreclosure activities will be conducted pursuant to applicable law. That didn't occur. They foreclosed with an unauthorized trustee, that's what we've alleged, that did not have the power to exercise the power of sale at a foreclosure sale and that's what they did. So they breached their own written agreement on the deed of trust. So that's another one.

THE COURT: Are there more?

MR. MORSE: Yes.

THE COURT: Okay.

MR. MORSE: Servicer Participation Agreement.

THE COURT: You disagree that the Plaintiffs lacked standing to --

MR. MORSE: I completely disagree. There are cases that -- I mean they make a general -- the Defendants make a general allegation that there are cases around the country where it's been found there are -- somebody is not -- the borrower is not a third-party beneficiary to a servicer participation agreement. Yes, there are cases that way, but there are also cases that cut the other way. It's a divided

decision there.

And also the banks, when these -- when these HAMP programs came to light or came into being after the financial crisis, the banks were given incentives, you know, from 500 to $1,500 to send people prequalification letters and get them evaluated for HAMP. And in fulfilling their duties, those are the type of agreements we need to see.

I mean they're saying that they're not a third-party beneficiary in the contract. I don't have the contract, but I've alleged that it exists, and I've alleged they're a third-party beneficiary under it. So unless they want to produce that SPA agreement, we can't say, no, they're not a third-party beneficiary. Let's see the agreement. They might be. It might be there in black and white. And at this point in the -- at this stage in the pleadings, we have a right to do discovery to find that agreement and see if they're a third-party beneficiary under that contract. We can't just blindly say, oh, no, they're not, because apparently some other cases have found they're not. We need to see the contract. And I think that's reasonable to get into discovery, get the Servicer Participation Agreement and read it and see if they're an intended beneficiary because they really might be.

THE COURT: So is the nature of the claim with respect to the SPAs that we don't yet know if we're

third-party beneficiaries but we might be, and we don't know what the terms of that agreement are, but it's possible that the banks breached that agreement in some respect that affects our rights?

MR. MORSE: Based on what we know -- and that's why we have allegations in here about the OCC consent decrees and things like that. That is one of the directional indicators that the banks were not doing what they were supposed to do under those agreements. And so we'd like to see that.

THE COURT: Okay. So what are the terms of the oral agreement for example on which the breach of contract claim rests? Where do we find the terms of that contract?

MR. MORSE: All right. I would point to facts 30 through 45 of the complaint. Plaintiffs contacted BAC and were told by Desmond Hunt on June 22nd that they were in review (unintelligible) --

(THE COURT REPORTER INTERRUPTED)

THE COURT: When you're reading especially, you need to slow down so that our court reporter can get what you're saying. But let me just -- let me just help you here. I've read very very carefully this series of factual allegations in the complaint several times. It's not your contention, is it, that this describes with any level of specificity the terms of an oral agreement with consent, and a meeting of the minds, a negotiated agreement that's mutually binding?

MR. MORSE: No. I -- I wouldn't say that it has the terms of what the loan modification that they're being prequalified for would be in it. It does not set out those terms, but --

THE COURT: So what is the contract?

MR. MORSE: Well, I would say that the contract does say if you do this and you send us this money and you send us this information, we will -- you're prequalified for a HAMP modification and you will get a loan modification. Those are the -- that's all the terms we have right now but they paid the consideration for it and it never came. They got jerked around for months and months after that. And here is the other point --

THE COURT: Well --

MR. MORSE: Okay. Go ahead, I'm sorry.

THE COURT: Go ahead.

MR. MORSE: In listening to the description of all this, I'd like to set the record straight on there's nothing in our complaint that admits a default. We don't even use the term default and there was no default. We actually say at complaint paragraph 22 and 23 with respect to the forbearance agreement that the Plaintiffs accepted the forbearance agreement and made all the payments due under the plan. And that --

THE COURT: I've got that.

MR. MORSE: You see that.

THE COURT: I'm going to bring you back to the contract. We're going to tackle this one issue at a time.

MR. MORSE: Gotcha.

THE COURT: I'm looking at paragraphs 92, 93 and 94.

MR. MORSE: Okay.

THE COURT: This is where the Plaintiffs specifically allege how the contracts, the unidentified contracts, are breached: By deliberately losing documents sent by the Plaintiffs; by failing to properly account for and apply the payments made by the Plaintiffs; and by failing to communicate with the Plaintiffs in a truthful and forthright manner about their HAMP loan modification application.

MR. MORSE: Okay.

THE COURT: There is nowhere in your complaint that I can see or in any of the materials that support this complaint, and I've looked at all of them, where I can identify those as material terms of agreements between the Plaintiffs and the Defendants. Have I just missed it?

MR. MORSE: As far as enforcing an oral contract, no. I mean --

THE COURT: Or written agreements?

MR. MORSE: Okay. Now, written agreements, yes. We'll look at what we have in writing. Okay. We have -- we

have the forbearance agreement. We have the promissory note, which is a negotiable instrument under UCC 3, and we've got the deed of trust, right? That's pretty much --

THE COURT: And the underlying loan agreement.

MR. MORSE: And the underlying loan agreement, correct. Now, in a breach of contract, inherent in every contract, implied in all contracts is the covenant of good faith and fair dealing. So what those -- when you point to 93, 94 and 95 -- or 92, 93, 94, those allegations are there in showing the breach of the implied covenant of good faith and fair dealing in even the written contracts. See, that's what that supports.

In addition to when you do this, when you deliberately lose documents, that's bad faith. When you fail to properly account for and apply payments the Plaintiffs have made, that's bad faith. Your contractual duty is to -- is to manage your documents correctly, is to, when you get a payment, to apply it to the correct loan account, and --

THE COURT: Well, but the --

MR. MORSE: -- do not lie.

THE COURT: The covenant of good faith and fair dealing --

MR. MORSE: Yeah.

THE COURT: -- protects the underlying interest that a party has in an agreement, right?

MR. MORSE: Yes.

THE COURT: That you're not deprived of the benefit of your bargain.

MR. MORSE: Right.

THE COURT: So which bargain is it that the Plaintiffs were -- I understand the facts that are alleged. There's no right for example under the underlying loan agreement to a modification.

MR. MORSE: No, no, but under the underlying loan agreement you are -- you have the right to have your payments applied properly and for them to accept the payments when you tender them. And that's one of the allegations we have here, that they've made a $1,500 payment that they just wouldn't accept. I mean and that violates the actual underlying loan agreement. That's a breach of that loan agreement to not apply the payments correctly.

THE COURT: Okay.

MR. MORSE: So that's an example --

THE COURT: Okay.

MR. MORSE: -- of that kind of breach. Now, look, I admit that I would just -- I would say this. If the Court's leaning towards saying, you know, I just can't find a contract here, I would submit that there are enough facts alleged that you can't as a matter of law say under no set of factual circumstances would the Plaintiffs be entitled -- or be able

to sustain a cause of action for breach of contract. I think we're getting -- I think we can all see that in fact that is a valid claim in a case like this. If it needs to be more artfully pled --

THE COURT: But you've misstated the standard I'm supposed to apply at this stage, right, under Iqbal and Twombly. It's a more rigorous standard than that. But beyond that, it's my job, isn't it, to make legal determinations, including for example whether there's an existing agreement --

MR. MORSE: Right.

THE COURT: -- a legally enforceable contract --

MR. MORSE: Right.

THE COURT: -- and the like. We agree about that?

MR. MORSE: We certainly agree about that.

THE COURT: Okay. I think I understand your argument with respect to the breach of contract claim. Let's --

MR. MORSE: And I hope to make it more specific. I'm sorry. Let's try negligence next.

THE COURT: That's all right. That's great. We'll turn to negligence.

MR. MORSE: Okay. Now --

THE COURT: And let me just -- let me cue you into where I'm focused on negligence. I'm really focused on duty. It's the first element of the cause of action.

MR. MORSE: Absolutely.

THE COURT: I don't see that the case law supports the theory that there's an independent duty between homeowners and banks who have different and competing interests.

MR. MORSE: You're correct. There's a -- I would say we would characterize that as a debtor/creditor relationship. However, I go back to Arrow Industries versus Zions Bank.

THE COURT: Right.

MR. MORSE: And I've actually highlighted the portion that I think has (unintelligible) in it.

THE COURT: Okay.

MR. MORSE: And I have a highlighted portion for the Court and for counsel.

THE COURT: Thank you.

MR. MORSE: There's two portions of this case I've highlighted because they're dead on. So when I was before Judge Stewart in the Coates case, I didn't ever get to do oral argument because the -- the case just sort of -- the homeowner moved on and so we never really got to get into this. But it was determined there that this Arrow Industries case was just about checks and the presentment of checks to banks, and so it didn't really apply to all UCC dealings in the State of Utah.

However, in the case itself the Utah Supreme Court is pretty clear that this extends to all transactions under the

UCC. And in footnote 18, which I've also highlighted, you'll see where they're coming from. But the basic premise is they cite with favor the authority from Phillips Home Furnishings. I think it's a Pennsylvania case. And it says we hold that a bank cannot contractually exculpate itself from the consequences of its own negligence or lack of good faith in the performance of any of its banking functions. We find that the public need for professional and competent banking services too great and the legitimate and justifiable reliance upon the integrity and safety of financial institutions too strong to permit a bank to contract away its liability for its failure to provide the service and the protections its customers justifiably expect, that is, for its failure to exercise due care and good faith.

Now, my point is that this precedent says that there is a duty independent of contract arising in tort to exercise due care and good faith in the conduct of banking operations, all of the banking functions, including those and specifically those set forth in the UCC.

Now, so what kind of UCC animals are we dealing with today with a promissory note and a deed of trust? We're dealing with Article 3 and Article 9 of the UCC, negotiable instruments and secured transactions. And if there is a -- I would just say if there is a question as to whether or not in the State of Utah there is an independent duty arising in

tort, I would suggest that we certify it to the Supreme Court under Rule 41 of the Utah Appellate Rules to see. Because if they're unclear -- I think this is clear, but if anyone thinks they're unclear, again, I would point to footnote 18 in this case. It says although the Court in (unintelligible) --

(THE COURT REPORTER INTERRUPTED)

MR. MORSE: Actually I don't even -- don't worry about that. That's not what we want. Given our holding concerning the bank's duty to act in good faith and exercise ordinary care in all its dealings, another exception is recognized. That's the point. In this case they recognize the bank's duty to act in good faith and exercise ordinary care in all its dealings, and that includes being a lender on a home loan.

THE COURT: So in every tort-based claim asserted against a financial institution, the first element is just always satisfied by virtue of the identity of the defendant. If it's a bank or financial institution, there's a duty period.

MR. MORSE: For the reason given that financial institutions, too big to fail, they're cornerstones of our economy, people must trust them. You must trust the bank you're dealing with or else there will be chaos, rioting in the streets, that type of -- that's the public policy rationale and it's outlined right here.

THE COURT: And there's no distinction if your interaction with the bank is as a depository for your life savings or whether they will endorse a check that you write or whether you're contracting with a bank for a loan for a car or for a home or whether a bank is underwriting a transaction for the acquisition of a company or whether it's -- you're saying there's always a duty if --

MR. MORSE: I'm saying if it's covered by the UCC, those -- that this duty arises.

The COURT: And the proposition -- the legal authority that you submit supports that proposition is just this case, right, the Arrow Industries case, the 1988 decision from the Utah Supreme Court?

MR. MORSE: This is my case. It's not been overruled and hasn't even really been distinguished when I Shepardized it.

THE COURT: And just to be clear, make sure I understand it, the highlighted portion opinion that you're highlighting here is from the Phillips Home case?

MR. MORSE: Correct.

THE COURT: Right.

MR. MORSE: It was language that the Supreme Court apparently agreed with.

THE COURT: Okay. Okay. All right. I understand.

MR. MORSE: Now, I have one other duty if that isn't

enough, breach of the -- breach of the statute itself. I have -- in my experience I have argued before the breach of the statute itself is negligence per se. It certainly is when violation -- violation of safety statutes, violation of this. When you violate the nonjudicial foreclosure statute, that's negligence per se. That's the first -- you had a duty to follow the statute if you're going to utilize the nonjudicial foreclosure scheme. So there's the duty. You will follow the statute. If you don't, there's your breach. The damage it caused, you've just messed up somebody's title and here we are.

THE COURT: Well, okay. Now you're focused on my next question.

MR. MORSE: Yeah, Sort of going --

THE COURT: Harm.

MR. MORSE: Harm, yes.

THE COURT: Both under your breach of contract theory I suppose insofar as you're talking about not foreclosing in the way you said you would.

MR. MORSE: Right.

THE COURT: And also here on your tort theory. What specific harm befell your clients?

MR. MORSE: Well, specifically my clients had equity in their home.

THE COURT: Okay.

MR. MORSE: Okay. So if they had been under water and you've taken away a liability, is that harm? Probably not. But they were not under water. They had equity in the home. And so when you take away that property interest, you've taken away an asset potentially. The other harm is --

THE COURT: Well, not potentially.

MR. MORSE: Yes.

THE COURT: Well, did they in this instance? Did your clients -- is it pronounced Kolkow? I've been saying clients and not referring to them by name.

MR. KOLKOW: It's Kolkow, just like if I was to call you on the phone.

THE COURT: Kolkow.

MR. KOLKOW: Kolkow.

THE COURT: I mean no disrespect by not --

MR. KOLKOW: If you get it right, you probably won't respond.

THE COURT: So the Kolkows, did they lose their equity interest in their house at this foreclosure?

MR. MORSE: Yes, they did.

THE COURT: And would they not have lost that equity interest had the bank foreclosed in a manner that you suggest they were required to do? Suppose the bank complied with the nonjudicial foreclosure statute --

MR. MORSE: Correct.

THE COURT: We still have a foreclosure.

MR. MORSE: Yep.

THE COURT: And the Kolkows still lose their equity position in the house, do they?

MR. MORSE: That is correct, yes.

THE COURT: Okay. So what harm befalls the Kolkows if the bank failed to foreclose in the way that they were required to foreclose?

MR. MORSE: Well, I mean we can show that the fallout of all this wrongful foreclosure resonates domino effects through consumer credit and all this. But I think -- this is what I love. You don't have -- believe it or not, harm is not the issue in an argument that a sale is void. Okay. I know we're talking about contract and negligence right now and you have to -- so if -- if -- in this case the harm -- I have a case where the harm is presumed when you lose title to real property. I would like to find that. Because real property is unique, you know, and although can be converted to economic metrics and whatnot --

THE COURT: But it's not your position, is it, in this case that the bank was prohibited from foreclosing?

MR. MORSE: It's prohibited from foreclosing in the manner it did.

THE COURT: Understand.

MR. MORSE: But not ultimately if they had done it

right, but they didn't do it right so --

THE COURT: Understand. So your case about losing title, that doesn't get you home here, does it, because --

MR. MORSE: It does here because this is actually what happened.

THE COURT: But as I understand what you're saying, the Kolkows were going to lose title one way or the other.

MR. MORSE: Well, no, they wouldn't have lost title if they hadn't -- like if they hadn't moved and kicked out renters that were paying the mortgage, who is to say that they would have lost title? They would have still been paying for the house so they would have still had title.

It's not -- and certainly the facts in my complaint don't say that they were in default or that they were in -- you know, they got offered a better deal from the bank, and they wanted to take it, so they moved back, much to their detriment arguably. But it's not a foregone conclusion that they would have lost the house if they had not listened to the bank. They probably wouldn't have lost the house and the bank might not have been able -- see, because they were in compliance with the forbearance agreement. There was no default. After the forbearance agreement they were back in -- the loan was back in good standing arguably. So there wouldn't have been default proceedings even initiated -- or foreclosure proceedings initiated if not -- but for the negligence, we

might not have gotten to foreclosure. That's I believe there in the complaint.

THE COURT: Okay.

MR. MORSE: So I would like to -- if the Court has already read my -- the Singer versus Chalmers case, I think that's a great place to go next for quiet title. And again I have a copy for the Court and a copy for counsel with the relevant portion highlighted.

THE COURT: You've turned now to the quiet title claim?

MR. MORSE: Yeah, quiet title.

THE COURT: Go ahead.

MR. MORSE: So this is one of the -- this -- yes, this is an old case. It's from 1880, but it hasn't been overruled or it's still good law. Sometimes when you get it right the first time, even back in 1880, it can hold up for centuries. So here we are at page nine or 547, depending on where you cite it from. The fact that no injury or fraud in the sale has been shown does not affect the question, nor is it affected by the fact that the purchaser was an innocent party. The sale was made by one not authorized to make it and cannot be upheld. It is simply void and no one gains any rights under it.

Now, it's important -- this is important, and the reason it works in our society is it keeps just any old person from

selling any old piece of property on the courthouse steps and making chaos. You have to have the authority to exercise the power of sale, either under the written document, or if you're using the nonjudicial foreclosure statutes, under those statutes.

You can't have it both ways. You can't -- because all states are not nonjudicial foreclosure. I'm sure you're aware. Some states are judicial foreclosure, some states are not. If you want to take advantage of the fast-track nonjudicial foreclosure route where you have a trustee sale on the courthouse steps, you've got to comply and you've got to be authorized.

THE COURT: Does the quiet title claim help the Kolkows in this case?

MR. MORSE: It does because -- and I can explain why, why it's there. There was a sister case to this where Fannie Mae came into court up in Ogden and tried to evict the Kolkows, and we said this trustee's deed that Fannie Mae claims that they own the property now under is invalid, Your Honor, because they got it from ReconTrust who didn't have anymore authority to sell it on the courthouse steps than some, you know, transient that just wanted a buck. There's really no difference. When you don't have authority to sell it, I mean it's void. And now so --

THE COURT: But you don't contend that the Kolkows

own the title to the house?

MR. MORSE: No. They -- they have title to the house, but I'm not saying it strips away the deed of trust or the loan. I mean the loan is still there. Ultimately this is how we would like it to be -- to be done. The foreclosure sale is void, like it never happened. Not -- it's not rescinded. There's nothing to rescind. It just has no effect. And then we're going to have to now at this late date reform the agreement a little bit such that they pick up the payments where they left off right before they couldn't make them anymore or because of the conduct of the Defendants.

But we're not trying to get rid of the obligations on the house or saying that there isn't a loan owed. We are saying that the warranty deed according to 2004 is superior title to the trustee's deed that Fannie Mae got at the foreclosure sale that was conducted by an unauthorized trustee.

THE COURT: And who owns title under the warranty deed?

MR. MORSE: The warranty deed vested title in the Kolkows subject to the lien of the trust deed. And we're saying that's still there, and that should be. I mean they're not trying to avoid any obligation. They're just trying to get it so that -- you know, that can get back on track, paid off like 90 -- I don't know what the percentages are anymore, let's say 95 percent of homeowners in the United States.

The COURT: Does the Garrett decision implicate the relief to which the Plaintiffs may be entitled and quiet title?

MR. MORSE: It would because if the Garrett decision -- if Judge Stewart -- or I can't remember if it's Judge Sam's or Stewart on Garrett -- Sam's, okay. So if the Tenth Circuit says that ReconTrust did have the authority to exercise the power of sale, then the foreclosure sale would not be void and that would be it. Then the trustee's deed would be valid and it would be superior to -- it would have divested the Kolkows of ownership entirely.

But at present we're saying that that trustee's deed is of no effect. Like I say, we're not -- they're not trying to avoid an obligation. I think that would be abhorrent, and we would never request that kind of relief, nor is that equitable. But it is equitable to say, hey, go back, and if we can't work this out, you know what, do the foreclosure right because it's not inconsequential. And the case law of Utah says that, you know, the fact that no injury or fraud in the sale has been shown doesn't affect the question. I mean that's it. I mean that's a red herring. Just because they've suffered no prejudice because they were going to get foreclosed on anyway, it doesn't mean you're allowed to just sell their house willy-nilly if you don't have the authority to do it. So that's our quiet title.

And as for Babcock versus RM Lifestyles, in RM Lifestyles the person seeking to quiet the title, they were seeking rescission, okay, or to set it aside that way because of an irregularity in the foreclosure sale.

THE COURT: Well, the trustee lacked authority to conduct the sale.

MR. MORSE: I think it was that they did the notice wrong --

THE COURT: Well --

MR. MORSE: -- and that's different.

THE COURT: But the -- okay.

MR. MORSE: That's -- there's a distinction there. Ultimately that trustee could have been appointed trustee. But in this case this person could never have been the trustee, or ReconTrust could never be the trustee.

THE COURT: And that's how you distinguish that case?

MR. MORSE: Yes.

THE COURT: The result in that case you distinguish on that basis?

MR. MORSE: They're different. This is void. That was seeking rescission. They're different legal animals. We're not looking to undo it. We're saying it never happened. It's -- I hope you don't think it's too clever by half but it's just black letter law in our opinion.

THE COURT: I understand your argument.

MR. MORSE: And I did want to inform the Court of one other pending thing that might resolve this as well. In addition to the Garrett argument at the Tenth circuit, on October 3rd of this year our firm and their firm presented oral arguments at the Utah supreme Court that raised ReconTrust authority issues as well, and that was briefed before the Utah Supreme Court. So they may come out with a decision even before the Tenth Circuit on what the state of the law is in Utah with regard to unauthorized trustees and preemption and stuff.

With regard to negligent infliction of emotional distress and --

THE COURT: I really have just one question about that initially. Why isn't the allegation in paragraph 123 exactly the kind of conclusory statement in support of an emotional distress claim that the case law tells me I can't sustain?

MR. MORSE: Well, how is it different?

THE COURT: Yes. You agree that the cases are clear that I can't sustain a claim where there is only a conclusory allegation about the distress, right?

MR. MORSE: Correct. But I would say that we've broken it out into identifying the mental components that they suffered, being anguish, stress, distress, anxiety that caused

the bodily injury, and that as soon as we can do our initial disclosures, we'll be able to provide the physicians and -- this is a fact -- this is a fact question, right, as to --

THE COURT: Well, today --

MR. MORSE: -- as to the extent of their --

THE COURT: Today it's a question about the sufficiency of the pleading --

MR. MORSE: Right, right.

THE COURT: -- on its face.

MR. MORSE: But I would say it would be hard to describe it much more -- I mean I say the mental anguish, stress, distress and anxiety which caused the bodily injury and harm requiring physical treatment so identified that they did have to seek medical treatment, that it caused injury to the body, and I identified the conditions. You know, I think the expert testimony will show exactly what -- what the, you know, psychological definition of it is, or if the Court needed more physical symptomology we could explain like the rashes, the heart, high blood pressure and the --

THE COURT: Is it your view that --

MR. MORSE: I think that 123 is sufficient because it's not -- it's -- it's not -- it's not just saying we suffered some emotional distress. We're saying here is the form of the emotional distress that led to the bodily harm. Now, we could identify the bodily harm a little more, but --

THE COURT: Your position is that on its face this is not conclusory and it includes sufficient detail to fall outside of the prohibition on conclusory allegations in support of the emotional distress claim?

MR. MORSE: I would hope so, Your Honor, based on the -- just the broken out description of the -- of the mental state.

THE COURT: Okay. Let's turn for a moment to the promissory estoppel claim.

MR. MORSE: Certainly.

THE COURT: Did I mischaracterize your claim when I was speaking with Mr. Thompson?

MR. MORSE: No. I actually thought you stated it rather eloquently.

THE COURT: So how far down the path do you believe this claim is intended to apply? Are the damages flowing from the promissory estoppel here the costs associated with leaving their residence in Arizona, moving here, there may be some costs or damages relating to leaving employment in Arizona?

MR. MORSE: Right, the differential between income.

THE COURT: And then, what, lost income from the rent that the Kolkows were receiving?

MR. MORSE: Correct.

THE COURT: In the Huntsville home?

MR. MORSE: Correct.

THE COURT: And that's the scope of consequential damages in general --

MR. MORSE: Yes.

THE COURT: -- that you have --

MR. MORSE: Of their reliance on the statements.

THE COURT: Not reaching into the foreclosure issues on that claim?

MR. MORSE: No.

THE COURT: Right. Okay. Okay. I'll put to you the same question I asked Mr. Thompson. What harm or prejudice befalls the parties if there are one or more claims that survive this motion? If the Court's -- if the Court denies without prejudice to the bank to refile the quiet title claim and the declaratory judgment claim, why wouldn't we wait for the Garrett decision?

MR. MORSE: I believe that might be prudent and save all parties money and time and the court time as well.

THE COURT: You would -- if one or more claims survive this motion to dismiss, the parties will engage in discovery and set off down the path?

MR. MORSE: Right. So then it would actually be even more substantial. We wouldn't be in the hypothetical, we have discovery items and, you know, they could bring a summary judgment or we could bring a summary judgment.

THE COURT: But what I'm interested in probing with you now is whether I'll be exposing the bank to massive and sweeping discovery requests on the quiet title claim and the declaratory judgment claim if -- if we proceed in the way I've just described?

MR. MORSE: I would say that I believe Mr. Thompson and I could craft a discovery order that prevented some nebulous search for smoking guns, if that's what the Court was concerned about.

THE COURT: Well, what factual discovery do you think would be relevant to the quiet title and declaratory judgment claims?

MR. MORSE: Honestly I believe -- you know, I believe a big portion of the declaratory judgment claims, based on the fact that, you know, it's undisputed that ReconTrust is not an attorney or title company, and so I mean those facts are undisputed. It's like we're almost ready to just get those resolved now and we would just want to wait for the Garrett decision. So there's not a lot of discovery that's needed on the quiet title or declaratory judgment.

THE COURT: Right. And quiet title would turn on, it seems to me, facts that are not in dispute in this case and the chain of title, which is a matter of public record.

MR. MORSE: Correct.

THE COURT: Okay.

MR. MORSE: There's no fact witnesses.

THE COURT: I just wanted to see if we were largely on the same page on that issue. All right. Is there anything else you'd like me to consider?

MR. MORSE: No. Your Honor, only if there really is a question too about negligence that you -- or duties arising under some previous decision or precedent of the Utah Supreme Court, it -- it might -- if we -- if we ask them about it now, it might come in the same time as Garrett. So I don't -- I don't know if you want to as a matter of expediency do that. Otherwise, if you're confident in the way the case law is, I'm not -- I'm not going to make a motion on Rule 41 at this point. There's no point.

I don't know if the Court was still considering the tender rule that was raised in the brief of the Defendants, but I would just distinguish the effect of the tender rule was when a party is seeking to rescind a contract. And I'm representing to the Court that we have not mentioned recession. We're not trying to get a rescission of the loan agreement, a rescission of the trust deed or anything. Maybe we're just having -- we just -- we're just seeking a declaration that the trustee's deed is void. So I would say the tender rule isn't applicable because it's -- I mean we actually want to enforce the contract between the parties with regard to the loan agreement.

THE COURT: Do you contemplate that the Kolkows would be making some back payment for months for which they've not been paying a mortgage?

MR. MORSE: I would contemplate that -- now there is where I would see the need for the Court to use equitable powers to say, well, look, you couldn't make the payments here from that date that they stopped accepting the 1,500. What are you supposed to do? I mean is the bank allowed to keep accruing interest on that when they wouldn't accept the payment?

I would say that that's where equity would step in and we can talk about reforming the arrangement between the parties to at least get it back to -- back in the box and back on track.

THE COURT: We're stretching the limits of the Court's authority at that point, are we not, to start recrafting private --

MR. MORSE: No. I mean the door is still open for reformation to the point that it still respects the original agreement of the parties. And I would say that that doesn't stretch it too much. So, anyway, I'll yield to Mr. Thompson.

THE COURT: Thank you, Mr. Morse.

MR. MORSE: Thank you.

THE COURT: Mr. Thompson, I'll let you have the last word since I started with you.

MR. THOMPSON: Okay. Just to follow up on some of the things that were at the very end of that. The tender rule, if it's not applicable it's because it's a California rule that has not been, as far as I know, adopted in Utah. But the rule is if you asked for the equitable right of -- remedy of rescinding a foreclosure, you must do equity yourself by tendering the amount that you admittedly owe. So it is an equitable rule and it would apply in this situation if it were adopted.

On the discovery issue I agree with Mr. Morse that on the quiet title and declaratory judgment it's a question of law. There really is nothing in dispute as far as I know about that, so I agree. And I also have a good relationship with him and I don't have any concerns about that.

He's a great lawyer, and I've worked with him a lot and he does great work for his clients, but in this case I just -- I feel like this is a complete moving target. This is not pled as a modification of the note, the deed of trust. If it were pled that way, we would have the right -- we would have argued about statute of frauds, we would have argued about the lack of consideration, we would have argued about a meeting of the minds. There's so many things that we would have argued about that -- you can't amend your complaint through a memorandum in opposition.

Similarly, this breach of contract claim based on

ReconTrust's role is, as far as I can remember, not pled. On the SPA, the Servicer Participation Agreement, counsel says that there are cases going both ways, but there are none cited in his brief. If there was something cited in his brief that -- I'm not aware of any.

All I know is the cases I've seen, and I think there are probably several more since we filed our briefs in this case, say the SPA is not a document that creates a cause of action for borrowers. And that stems from the fact that across the nation HAMP does not create a cause of action. The Home Affordable Modification Program is not -- it is a voluntary process that lenders and loan servicers allow borrowers to go through. And that voluntary process kind of goes to a lot of claims here, like when we start are taking about duty.

THE COURT: But we have some valid contracts between the parties.

MR. THOMPSON: No question.

THE COURT: Do we have an implied covenant of good faith and fair dealing then?

MR. THOMPSON: We do have an implied covenant of good faith and fair dealing, but it can't --

THE COURT: It attaches to every contract in Utah.

MR. THOMPSON: Absolutely. But it can't -- you can't use that to rewrite the contract to give someone benefits that the contract doesn't provide, and a loan

modification process is exactly that. There's another -- well, getting back to the contract.

THE COURT: What about --

(MULTIPLE SPEAKERS)

MR. THOMPSON: -- performance.

THE COURT: What about communicating truthfully with a contracting party, is that -- is that wound up in the implied covenant of good faith and fair dealing?

MR. THOMPSON: Because it does not relate to any of the contractual rights, which are here is the money, and this is how you're going to repay us, it's something extra contractual. If they were going to bring up a negligent misrepresentation or fraud claim, we would be arguing the economic loss rule or, you know, something along those lines, but that's not here.

On duty, the negligence -- oh, I would also like to just finalize this thing on -- Mr. Morse says there's no admission of default, but the forbearance agreement itself is an admission of default. It has an admission -- such an admission in the agreement itself.

And this failing to apply payments claim, I don't even know what it is. I mean that -- I can understand if the allegation was we didn't default on this loan. Well, then, if that was the allegation, then it would be in this complaint, and that's not the allegation. And I have some of those cases

where those are the allegations and that's not here.

On duty and negligence --

THE COURT: Can you give me just a moment?

MR. THOMPSON: Yes.

(BRIEF PAUSE)

The COURT: Where do you think in the forbearance agreement there is an acknowledgment that the loan is in default?

MR. THOMPSON: Well, on the first page, my representations --

THE COURT: There's also a paragraph about foreclosure activity, suspending schedule for -- there wasn't a foreclosure sale set though when the forbearance agreement was entered in this case, was there?

MR. THOMPSON: I don't believe so.

THE COURT: But go ahead. I interrupted you.

MR. THOMPSON: Okay. Well, do you want me to keep with this or go to --

THE COURT: Was there somewhere else in here?

MR. THOMPSON: Oh, that -- my representations. I'm unable to afford my mortgage payments and as a result I'm either in default or believe I will be in default under the loan documents and I do not have access to sufficient liquid assets to make the scheduled monthly mortgage payments under my loan documents now or in the near future.

THE COURT: I see that, right, okay.

MR. THOMPSON: Negligence. There's not a -- there's a number of cases that we cite in our briefs, and again they're kind of old briefs, but not a single one creates any kind of duty that is enforceable under tort law related to the loan modification process. The Arrow Industries case has been distinguished by several of the courts that have decided this exact question. And we're talking about a purely voluntary -- voluntary decision to review someone for a modification, and that's not the kind of thing that as a matter of public policy should be subject then to a negligence claim or tort duty.

The UCC -- the deeds of trusts and mortgages are governed by a very specific section of the Utah Code, section 57, and there are several cases, which I don't get into in my briefs but I could if the Court would like, from this Court saying the UCC is not the applicable law here.

So I mean basically we don't have a single case here or in any other jurisdiction that I'm aware of creating a negligence duty on a voluntary loan modification.

THE COURT: What about on the underlying loan agreement?

MR. THOMPSON: What about under the --

THE COURT: Is there a duty flowing vis-a-vis the bank and the lender on the underlying loan agreement?

MR. THOMPSON: There's the duties in the underlying

loan agreement. I mean -- and then that gets you to the economic loss rule, which is you can't create a tort duty based on a contract duty absent personal injury or property damage.

If the Court would like to hear a little bit about this harm element which goes to the contract in negligence if you get past duty, there was a lot of talk about equity in the home and title. And I think the Court was absolutely correct, none of that relates to -- it has to be causally related to a breach, and none of it relates to that because -- so we're talking about ReconTrust, their role, that's -- the Court is correct, that -- there was an entitlement to foreclose after the default. And so whether ReconTrust did it or another entity, a lawyer, Mr. Matheson, there is no causal link to harm from any of the allegations in the complaint related to either negligence or contract.

On the voidness question, Mr. Morse talks about -- in some of the briefs he referred to the deranged lunatic on the courthouse steps purporting to sell properties, but that's not what this is. This is a validly and duly substituted trustee. There is a recorded substitution of trustee appointing them in that role, which the deed of trust allows the lender to do, or MERS.

And just a clarification. The statute, 57-1-21 I believe, says that ReconTrust can be a trustee. The question

is whether or not they can exercise the power of sale.

On the 1880 case, I think we've argued that as much as we can, but the facts are very different. It's a very specific provision in the deed of trust. The specific statutory provisions in section 57 of the Utah Code specifically supersede --

THE COURT: I'm comfortable with the 1880 decision.

MR. THOMPSON: All right. Unless the Court -- I would also mention the Sundquist case that Mr. Morse mentioned. I'm not sure what the Utah Supreme Court is going to do, obviously, but we would obviously contend that this is a federal question and the Tenth Circuit is the one that needs to decide it because the question is what are the powers granted under the National Banking Act.

Unless the court has any questions --

THE COURT: What do you make of Mr. Morse's distinction of RM Lifestyles, if I've said that -- the case names are all blurry now -- but that that case is inapplicable because the trustee may not have been duly authorized but could have been and in this instance could never be?

MR. THOMPSON: Well --

THE COURT: Is that a distinction without merit or is there a substantive element to that?

MR. THOMPSON: I would say that it is a continuation

in a long line of cases that depart from this over -- some of the overbroad language in the 1880 case where it says -- where, you know, you have a duly authorized and substituted trustee, and the question is what is the harm? And without harm, without some kind of prejudice to their ability to protect their interests, we don't set aside foreclosure sales.

THE COURT: And it's problematic, isn't it, that language in the 1880 decision because in the instance of foreclosures you also end up with good faith purchasers, you've got other people who rely on the foreclosure, the validity of the sale and the like downstream. Am I right about that?

MR. THOMPSON: I think that's exactly why the legislature didn't include voidness as a remedy in 57-1-23.5, that, you know, you can -- I'm not saying that if they were correct on the ReconTrust lacks authority argument that you could obtain an injunction against it. But after it's done, we're not setting it aside unless you meet these very specific and stringent criteria.

The COURT: Is it a different consideration if its the lender who purchases the property on a credit bid?

MR. THOMPSON: Well, I mean I don't think it changes the policy, which is that we need finality when we're dealing with real estate and real estate transactions. I mean because

the lender purchases on a credit bid and then sells, and now you're in the exact same position. In this case I don't believe -- I mean I know it hasn't because the Kolkows still possess the property. But that's the reason for the policy.

THE COURT: All right. Well, thank you. Thank you, Mr. Thompson. Thank you, Mr. Morse. I appreciate very much your briefing, which was very helpful, and the authorities that you've cited there, and your argument today has been also very helpful as well, so I appreciate that.

I'm aware, of course, that this motion has been pending a long time, and this case has moved from judge to judge and place to place and it's caused some delays for the Kolkows and for the bank and for that I apologize, but we'll take this matter under advisement and we'll try to get a ruling to you in a timely fashion.

MR. MORSE: Your Honor, I have one other matter, I'm sorry. I forgot to give you one other case that I prepared. If it would help, I'd like to --

THE COURT: I will read anything you'd like me to consider, if you'd hand a copy of that to our Courtroom Deputy.

MR. MORSE: This is the -- this is just the foreclosure statute I was giving a copy to the Court, and then along with it was Ashby versus Ashby that has a highlighted portion as to how in Utah you determine whether a statutory

provision preempts alternative remedies, so I thought that was cogent.

THE COURT: Thank you. Is there anything else we should address today, counsel?

MR. MORSE: I believe that's it, Your Honor.

MR. THOMPSON: No, sir.

The COURT: All right. Thank you for your time. We'll be in recess.

(HEARING CONCLUDED AT 5:13 PM)

* * *

Certificate of Reporter

I, Raymond P. Fenlon, Official Court Reporter for the United States District Court, District of Utah, do hereby certify that I reported in my official capacity, the proceedings had upon the hearing in the case of Kolkow Vs. Bank of America, et al., case No. 1:11-CV-118, in said court, on the 20th day of December, 2012.

I further certify that the foregoing pages constitute the official Transcript of said proceedings as taken from my machine shorthand notes.

In witness whereof, I have hereto subscribed my name this 19th day of October, 2015.

/s/ Raymond P. Fenlon